IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9998 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

S.R. KOSHTI

Versus

COMMISSIONEER OF INCOME-TAX

Appearance:

1. Special Civil Application No. 9998 of 2004
MS SONAL D VYAS for Petitioner
MR MANISH R BHATT for Respondent

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 28/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. Rule. Mrs.M.M.Bhatt, the learned standing counsel for the respondent waives service of rule. When the notice was issued on 23rd August 2004, the Court had issued the notice for final disposal. Hence, in the light of the peculiar facts of the case, the petition is taken up for final hearing and disposal.

2. The petitioner, an individual, challenges, by way of this petition under Articles 226 and 227 of the Constitution of India, the orders made by the Commissioner of Income Tax, Ahmedabad VII, Ahmedabad under Sections 263 and 264 of the Income Tax Act, 1961 (the Act) on 29th March 2004.

3. The petitioner was working as Assistant Manager with Industrial Financial Corporation of India Limited (the employer). On an offer being made by the employer, the petitioner opted under the Voluntary Retirement Scheme and received a compensation of Rs.7,50,000=00. Admittedly, when the payment of the said amount was made by the employer, the employer did not inform the petitioner regarding the exemption from tax that the petitioner would be entitled and accordingly, in absence of the necessary clarification or the certificate from the employer, the petitioner furnished the return of income on 31st July 2001 for Assessment Year 2001 - 2002. It is the say of the petitioner that, subsequently, the petitioner became aware that he was entitled to certain portion of the income so received as being exempt under Section 10(10C) of the Act, but the employer had deducted tax at source on the entire amount by treating the same as salary and accordingly, the tax deduction certificate in Form No.16 had been furnished by the employer, which was annexed by the petitioner to the return of income filed by the petitioner. Accordingly, the petitioner had declared a total income of Rs.9,98,182=00 on the basis of tax deduction certificate issued by the employer in Form No.16 and claimed a refund of Rs.12,219=00.

4. There appears to be some dispute between the petitioner and the respondent as to whether the aforesaid return of income was or was not processed under the provisions of Section 143(1) of the Act. It is the stand of the respondent, as averred in the affidavit-in-reply, that the return of income was processed on 28th March 2002 and refund order had been issued which was encashed by the petitioner - assessee through his bank account.

5. According to the petitioner, the petitioner had

not received any intimation under Section 143(1) of the Act regarding the refund claim of the petitioner and as such, because a period of twelve months had elapsed from the date of the filing of the return, he consulted a Tax Practitioner for the possible course of action. It is the say of the petitioner that it was at this point of time that the petitioner was advised that he had committed a mistake in not claiming the exemption available under Section 10(10C) of the Act from the V.R.S. compensation received by him. Accordingly, on advice received, a revised return of income came to be filed on 24th September 2002 claiming exemption of Rs.5,00,000=00 from the compensation under Section 10(10C) of the Act.

6. The assessing officer, having jurisdiction to assess the petitioner, called for various details, namely, (i) an order of the company regarding the exemption available up to an amount of Rs.5,00,000=00 of V.R.S., (ii) copy of original Statement of T.R., (iii) Home Loan Certificate, (iv) Income from other sources, and (v) Table with Form 10E. On being furnished the details called for, the assessing officer framed an order under Section 154 of the Act rectifying mistake apparent on record and granting credit for prepaid taxes to the tune of Rs.3,18,195=00. The assessing officer also directed to grant interest under Section 244A of the Act. The order was made on 27th March 2003.

7. It appears that the order was forwarded to the Additional Commissioner of Income Tax for the purpose of approval, but the Additional Commissioner of Income Tax did not approve the same. Subsequently, the respondent Commissioner took action under Section 263 of the Act to revise the order made under Section 154 of the Act. Rejecting the contention raised by the petitioner in its reply, the impugned order dated 29th March 2004 (Annexure "G") came to be made by the respondent. He held that the order dated 27th March 2003 made under Section 154 of the Act was erroneous and prejudicial to the interest of revenue and as such, cancelled the same. As a result, the order under Section 143(1) of the Act, accepting the returned income at Rs.9,98,182=00 was held to prevail on the basis of the original return of income dated 31st July 2001.

8. In the meantime, the petitioner preferred an application under Section 264 of the Act, requesting the respondent Commissioner to revise the intimation made by the assessing officer on the return filed by the petitioner on 31st July 2001 or grant relief on the basis

of revised return filed on 24-9-2002. The revision petition was filed on 4th July 2003 and the petitioner had further requested that, in the peculiar circumstances of the case, the delay in preferring the same may be condoned. It was the case of the petitioner that the order made by the assessing officer under Section 154 of the Act was in order and if the same was found to be incorrect, the petitioner be assessed on the basis of revised return filed on 24th September 2002 and grant the relief admissible under the provisions of Section 10(10C) of the Act, directing the assessing officer to issue further refund along with admissible interest at appropriate rate under Section 244A of the Act. The respondent has rejected the petition under Section 264 of the Act on 29th March 2004 by holding that the petition was beyond the period of one year from the date of passing the order in the case of the petitioner under Section 143(1) of the Act and hence, the delay was not condoned. He has also referred to the order made by him under Section 263 of the Act for the purposes of denying the relief by holding that the revised return filed on 24th September 2002 was an invalid return, being a return filed out of time and hence, non-est at law.

9. Mrs.Sonal D.Vyas, the learned advocate for the petitioner has reiterated the submissions made in the revision petition filed before the Commissioner under Section 264 of the Act, while Mrs.M.M.Bhatt, the learned standing counsel appearing on behalf of the respondents has vehemently referred to the averments made in the affidavit-in-reply and pleaded that the impugned orders under Sections 263 and 264 of the Act do not require to be interfered with.

10. The reasons which have weighed with the respondent Commissioner while passing the impugned order under Section 263 of the Act are; (i) that the revised return filed on 24-9-2002 was beyond the period of limitation prescribed under Section 139(5) of the Act; (ii) the order dated 27th March 2003 passed under Section 154 of the Act by the assessing officer was prejudicial to the interests of revenue inasmuch as the income assessed in the said order was much lower than the taxable income earned by the petitioner during the year and shown in Form No.16 by the employer. According to the respondent, the original return filed on 31st July 2001 was processed under Section 143(1) of the Act on 28th March 2002 and hence, the revised return ought to have been submitted by 28th March 2002 or 31st March 2003, whichever was earlier. It is necessary to note that, in paragraph 4 of the affidavit-in-reply, the

respondent states that the refund of Rs.12,290=00 was issued on 13th May 2002. Therefore, there is no question of applying first termini namely, 28th March 2002, which is the date worked out by the respondent as being the date on expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. The Assessment Year being 2001 - 2002 and the return having been filed on 31st July 2001, the expiry of one year from the end of the relevant assessment year would be 31st March 2003. Admittedly, the revised return has been filed on 24th September 2002 i.e. before 31st March 2003. Therefore, the emphasis by the respondent on the order under Section 143(1) dated 28th March 2002.

11. It is an admitted fact, so far as the respondent is concerned, that no assessment order, as such, has been framed under Section 143(3) of the Act. The return originally filed by the petitioner has been processed under Section 143(1)(ii) of the Act i.e. a refund due on the basis of such return has been granted. However, it requires to be noted that the respondent has no where stated that the refund order was accompanied by an intimation as required under the said provision. Even if, for the sake of argument, it is accepted that an intimation was also forwarded along with the refund order, the same was admittedly issued only on 13th May 2002. In the circumstances, there being no order of assessment as envisaged under the provisions of the Act, a revised return under Section 139(5) could have been submitted by the petitioner on or before 31st March 2003, and in fact, was so submitted on 24th September 2002.

12. Under Section 143, the following Explanation was inserted by Finance Act, 1994 w.e.f. 1st June 1994 :

> "Explanation - An intimation sent to the assessee under sub-section (1) or sub-section (1B) shall be deemed to be an order for the purposes of sections 246 and 264."

On a plain reading of the said Explanation, which was omitted by Finance Act, 1999 w.e.f. 1st June 1999, it becomes clear that even for the limited period when the legislature wanted the intimation to be deemed to be an order, it was for a limited purpose, namely, for the purposes of appeal under Section 246 of the Act and revision at the instance of an assessee under Section 264 of the Act. Thus, even when the said Explanation was on the statute book, the power to invoke the provision of section 263 of the Act could not be exercised in the

circumstances. For the year under consideration, admittedly, the said Explanation is not on statute book. The respondent, therefore, could not have, in the circumstances, treated the intimation as an order for the purposes of non-suiting the petitioner by treating intimation dated 28th March 2002 as being an order of assessment and thus, denying the petitioner a statutory right to file a revised return within the period of limitation. The revised return is filed within the period of limitation and is hence valid. In these circumstances, the finding recorded by the respondent in the impugned order under Section 263 of the Act that the revised return was non-est in law, cannot be sustained and is accordingly held to be bad in law.

13. The next limb of the order of the Commissioner proceeds on the footing that the order made on 27th March 2003 under Section 154 of the Act is prejudicial to the interests of revenue. However, the position in law is well settled and in case of Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, [2000] 243 ITR 83, the Apex Court has held that, every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interest of the revenue. When an assessing officer has adopted one of the courses permissible in law, and which has resulted in loss of revenue, or where two views are possible and the assessing officer has taken one view, with which the Commissioner does not agree, the order cannot be treated to be erroneous and prejudicial to the interests of revenue, unless the view taken by the assessing officer is unsustainable in law. As already noticed hereinbefore, the assessing officer was not only right in law, but was fully justified in passing the order under Section 154 of the Act after entertaining the revised return which was filed within the time limit statutorily prescribed. Therefore also, the respondent could not have assumed jurisdiction under Section 263 of the Act.

14. In the order under Section 263 of the Act, the respondent Commissioner has not dealt with the principal issue which goes to the root of the matter, namely, whether the petitioner was entitled to claim exemption under Section 10(10C) of the Act or not, and the same has been brushed aside by observing :

> "The issue, whether the assessee was legally entitled to claim exemption under Section 10(10C) of the I.T. Act, at Rs.5,00,000=00 out of the V.R.S. amount of Rs.7,50,000=00 is a separate issue and not for consideration here."

This observation assumes importance in light of the findings recorded by the respondent Commissioner in his separate order of even date made under Section 264 of the Act.

15. The respondent, while framing the assessment under Section 264 of the Act refers to and relies upon his own order made under Section 263 of the Act, of even date, to emphasize that the revised return filed on 24th September 2002 was an invalid return. Thereafter, the respondent refers to the salary certificate issued by the employer in Form No.16 on 30th April 2001 and states that the gross salary shown by the employer is Rs.10,28,182=00, and on basis of the said certificate issued by the employer, upholds the income tax calculation sheet prepared by the assessing officer in pursuance of the original return of income. Thus, without dealing with the merits of the claim under Section 10(10C) of the Act, the respondent merely relies on the fact that the original return was processed under Section 143(1) of the Act on 28th March 2002 and the consequential refund order issued thereupon being encashed by the petitioner. In paragraph No.5 of his order under Section 264 of the Act, the respondent ultimately rejects the petition by holding that the revision petition was beyond the period of one year from the date of passing the order in assessee's case under Section 143(1) of the Act and hence, refuses to condone the delay.

16. Intimation under Section 143(1) of the Act is not an order of assessment, as already held hereinbefore, considering the scheme of the Act and hence, that could not have been a ground for refusing to condone the delay.

17. As to what is the scope of the powers of Commissioner in revisional proceedings under Section 264 of the Act, is well settled by a decision of this Court in C. Parikh & Co. v. Commissioner of Income Tax, Baroda, [1980] 122 ITR 610. In the said case, the petitioner was assessed under Section 143(3) of the Act on the basis of the return of income submitted by the petitioner. The returned income was accepted along with a lumpsum addition. However, subsequently, it was found by the assessee that, in the balance sheet submitted along with the return, there was a discrepancy on the basis of which the petitioner was over-assessed when the assessment order was passed. The petitioner, therefore, undertook close examination of the books of account and detected mistakes and ultimately, moved the Commissioner

under Section 264 of the Act, seeking relief to the extent of Rs.20,000=00. The Commissioner was of the view that his revisionary powers did not extend to giving relief to an assessee on account of assessee's own mistake which the assessee detects after the assessment is completed, and thus, rejected the petition. This Court, on an analysis of the powers of the Commissioner under Section 264 of the Act, has observed thus at pages 613 and 614 of the Report.

"It is clear that under Section 264, the Commissioner is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the Commissioner may, either of his own motion or on an application by the assessee, call for the record of any proceedings under the Act and pass such order thereon not being an order prejudicial to the assessee, as he thinks fit. Sub-sections (2) and (3) of Section 264 provide for limitation of one year for the exercise of this revisional powers, whether suo motu, or at the instance of the assessee. Power is also conferred on the Commissioner to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the Commissioner has no power to revise any order under Section 264(1): (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Income Tax Appellate Tribunal. Subject to the above limitation, the revisional powers conferred on the Commissioner under Section 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitations prescribed in section 264, the Commissioner in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in section 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over-assessed after the assessment was completed. We do not read any such embargo in the Commissioner's power as read

> by the Commissioner in the present case. It is open to the Commissioner to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the Commissioner to admit such a ground in revision. The Commissioner was also not right in holding that the over-assessment did not arise from the order of assessment. Once the petitioner was able to satisfy that there was a mistake in totalling purchases and that there was under-totalling of purchases to the tune of Rs.20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The Commissioner would not be acting dehors the I.T. Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the Commissioner has misconstrued the words "subject to the provisions of this Act" in section 264(1) and read a restriction on his revisional power which does not exist. The Commissioner was, therefore, not right in holding that it was not open to him to give relief to the petitioner on account of the petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under section 264(1). In our opinion, therefore, the Commissioner was wrong in not giving relief to the petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs.20,000."

18. The position is therefore that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been over-assessed under the provisions of the Act, regardless of whether the over-assessment is as a result of assessee's own mistake or otherwise, the Commissioner has the power to correct such an assessment under Section 264(1) of the Act. If the Commissioner refuses to give relief to the assessee, in such circumstances, he would be acting dehors the powers under the Act and the

provisions of the Act and therefore, is duty bound to give relief to an assessee, where due, in accordance with the provisions of the Act.

19. In the present case, the respondent Commissioner has no where stated that the petitioner is not entitled to the relief under section 10(10C) of the Act. In fact, the said position is undisputed. The assessing officer himself had passed an order under Section 154 of the Act, granting such relief. In the circumstances, even the order under Section 264 of the Act made on 29th March 2004, cannot be sustained.

20. A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. Shri N.O.Parekh., the Commissioner of Income Tax, Special Civil Application No.622/1981, rendered on 20-8-1981, has laid down the approach that the authorities must adopt in such matters in the following terms :

> "The Supreme Court has observed in numerous decisions, including Ramlal and others v. Rewa Coalfields Ltd., AIR 1962 SC 361; The State of West Bengal v. The Administrator, Howrah Municipality and others, AIR 1972 SC 749, and Babutmal Raichand Oswal v. Laxmibai R. Tarte, AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."

21. In the result, the orders dated 29th March 2004 made under Sections 263 and 264 of the Act are quashed and set aside, and the order dated 27th March 2003 made by the assessing officer under Section 154 of the Act shall prevail. The respondent is directed to not only issue the refund due in accordance with the order under Section 154 of the Act dated 27th March 2003, but also grant interest under Section 244A of the Act, till the date of payment of the refund at appropriate rate, as may be prevalent from time to time. The respondent is

directed to ensure that the refund along with the interest due is paid within a period of three weeks from the date of receipt of a writ of this Court, or a certified copy of this judgment and order, whichever is earlier.

22. The petition is allowed accordingly. Rule is made absolute. The respondent shall pay the costs quantified at Rs.5,000=00. The revenue shall, in the first instance, pay the costs along with the refund to the petitioner, and recover the same from the respondent Commissioner, who shall bear the same out of pocket.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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